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**IN THE SUPREME COURT OF THE UNITED STATES.**
***October Term, 1949.***

**No. .....**

**KEOKUK STEEL CASTING COMPANY, a Corporation,**
***Petitioner,***

***vs.***

**J. R. LAWRENCE, *Respondent.***

## PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

*To the Honorable the Supreme Court of the United States:*

Comes now the petitioner, Keokuk Steel Casting Company, a corporation, and applying for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, respectfully shows this Court:

### Statement of the Matter Involved.

The rule announced in *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state," governs the instant case. Under the applicable statutes of the State of Oklahoma and the decisions of its Supreme Court the petitioner should have prevailed, but the Court of Appeals failed to follow the applicable Oklahoma statutes and decisions cited to it by petitioner and in

total disregard thereof affirmed the judgment of the trial court in favor of respondent.

The opinion of the Court of Appeals was rendered on December 29, 1949, and appears in the record (R. 105). Judgment was entered on that date affirming the judgment of the trial court (R. 111). On January 19, 1950, an order of the Court of Appeals was entered staying the mandate of said court to March 1, 1950 (R. 111).

The facts are briefly as follows: Petitioner is a manufacturer of steel castings and respondent is a manufacturer's agent. On December 28, 1939, the parties executed a written contract by the terms of which respondent became the agent of the petitioner within a designated geographical area. The contract also provided that it was non-transferable and might be terminated by either party upon thirty days' notice in writing (R. 17).

In June, 1940, with the appearance of clouds of war upon the horizon, Mr. Jansson, Vice-President of petitioner, had a conversation with respondent about the prospect of respondent being drafted but was assured by respondent that this was unlikely (R. 7). No further conversations were had between the parties until August, 1941. Meanwhile respondent, who was a graduate of Annapolis, made arrangements to go into the Navy. In August, 1941, an exchange of letters passed between the parties, as well as a telephone conversation. The cancellation clause in the contract of December 28, 1939, was not mentioned. There is no question but that these letters modified the contract of December 28, 1939, to the extent that respondent was permitted to substitute the services of his father for himself for an indefinite period of time. Later the parties disagreed and petitioner served a thiry days' notice of termination of the contract upon respondent. Respondent brought this ac-

tion for breach of contract against petitioner asserting that the exchange of letters hereinabove referred to constituted a modification of the original contract between the parties of December 28, 1939, making it irrevocable so long as respondent remained in the armed forces.

This case was tried twice by the trial court. In the first trial judgment was rendered in favor of petitioner. Upon appeal to the United States Court of Appeals the judgment of the trial court was reversed and the cause remanded for a new trial: *Lawrence* v. *Keokuk Steel Casting Company,* 162 F. (2d) 929. In its opinion on the first appeal the Court of Appeals held that the letters of ~~May~~ AUGUST, 1941, were ambiguous in so far as the question of whether they had the effect of abrogating or suspending the cancellation clause of the contract of December 28, 1939, was concerned. The trial court was directed to grant a new trial and admit evidence with respect to the prior oral negotiations between the parties in an effort to resolve the ambiguity arising from these letters.

In the second trial evidence concerning the oral negotiations between the parties was presented. The evidence of respondent upon this point, however, instead of resolving the ambiguity merely compounded it—the oral negotiations between the parties, as testified to by respondent, were couched in the same ambiguous terms as the language used in the letters which the Court of Appeals had already held to be ambiguous. *In other words, the evidence represented an attempt to explain an ambiguity by an ambiguity.* The uncontradicted testimony of the petitioner was to the effect that the cancellation clause of the original contract was never mentioned or discussed with respondent; that it was never the intention of petitioner to suspend or abrogate the same, and that petitioner was unaware that respondent so

understood the matter. The only question presented to the trial court was whether the parol evidence resolved the ambiguity in the letters and disclosed that it was the intention of the parties that the cancellation clause of the original contract be cancelled, modified or suspended for the duration of respondent's naval service. It was respondent's burden to prove this fact by a preponderance of the evidence. Moreover, the statutes of Oklahoma lay down certain rules of construction applicable to the situation confronting the trial court.

Title 15, Sec. 165, Oklahoma Statutes 1941, provides:

> "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense which the promisor believed, at the time of making it, that the promisee understood it."

Title 15, Sec. 170, Oklahoma Statutes 1941, has been construed in *Kondos* v. *Stauffer,* 180 Okl. 185, 69 P. (2d) 338, as follows:

> "If the words used give rise to ambiguity, the contract should be construed less favorably to the party using the ambiguous terms in the contract."

The petitioner was the "promisor" within the meaning of Title 15, Sec. 165, *supra,* and the respondent was the person using the ambiguous terms in the letters within the rule expressed in the *Kondos* case, *supra.*

There is a further rule on construction binding on the trial court announced by the Oklahoma Supreme Court in *Continental Supply Co.* v. *Levy,* 121 Okl. 132, 247 Pac. 967, as follows:

> "One claiming that a contract modifies a prior contract must show the latter contract is definite and certain as to the terms of modification, *and the modifica-*

*tion extends only so far as the terms are definite, certain, and intentional.*" (Emphasis ours.)

These applicable and binding Oklahoma authorities, together with others, were presented to the trial court by petitioner. The trial court, however, in disregard of the holding of this Court in *Erie Railroad Co.* v. *Tompkins, supra,* failed to apply the law of Oklahoma and rendered judgment in favor of the respondent and against petitioner. The Court of Appeals likewise failed to apply the applicable Oklahoma statutes and decisions and affirmed the judgment of the trial court. In its opinion the Court of Appeals cited no Oklahoma authority for its decision, and as a matter of fact quoted no authority at all. It merely quoted the letters, noted that it had previously held them to be ambiguous, then summarized the crucial oral negotiations of ~~August~~ June, 1940, (which summary was two words longer than the actual testimony) and declared "The provisions of the two letters, read in light of the oral evidence, plainly indicated that it was the intention of the parties that the modified agency contract should continue in effect until Lawrence's discharge from the Navy" (R. 111). It is the contention of petitioner that had the Court of Appeals applied the rules governing the construction of contracts announced by the statutes of Oklahoma and the decisions of its Supreme Court, as it was bound to do by *Erie Railroad Company* v. *Tompkins, supra,* that it could not have declared that the ambiguous parol evidence introduced by the respondent disclosed a modification of the cancellation clause of the original contract which was "definite, certain, and intentional."

**This Court Has Jurisdiction.**

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended, Title 28, Sec. 347(a) F. C. A., and Supreme Court Rule 38, par. (5) (b).

**The Question Presented.**

Whether the Court of Appeals, in affirming the judgment of the trial court, disregarded the holding of this Court in *Erie Railroad Company* v. *Tompkins,* by failing to cite or apply the applicable law of the State of Oklahoma.

**Reasons Relied Upon for Allowance of Writ.**

(*1*) The Court of Appeals in its opinion quoted at length from the letters between the parties of August, 1941, which it had held on a prior appeal of this case to be ambiguous. That Honorable Court then *summarized* the prior oral negotiations between the parties, particularly the crucial conversation between respondent and petitioner of June, 1940. The testimony of respondent concerning that conversation consisted of 118 words. The "summary" of the Court of Appeals of the same conversation consisted of 120 words. The "summary," in our humble opinion, made out a better case for the respondent than did the actual testimony. The applicable Oklahoma statutes and decisions, hereinabove noted, quoted to that court by petitioner, were not cited in the opinion, no attempt was made to distinguish them, they were in fact totally ignored. If the applicable law of Oklahoma had been applied to this case then judgment should and would have been entered for petitioner instead of respondent.

(*2*) *Erie Railroad Company* v. *Tompkins, supra,* was a landmark decision of this Court. It was designed to correct a flood of abuses and remove serious uncertainties. It is a matter of grave and general concern that not only the form but the spirit of this decision remain inviolate. If the inferior Federal courts, in a proper case, may totally disregard the applicable and controlling state law by merely

failing to cite or distinguish it, then the rule of *Erie Railroad Company* v. *Tompkins* is impotent. It is humbly suggested that this Court might clarify this situation by laying down a rule for the guidance of the Courts of Appeal requiring them when leading State law, apparently applicable, is presented, to either apply it or distinguish it. We do not mean to suggest that every authority cited by a litigant must be cited or distinguished, but merely that when ample State authority is available a Court of Appeals should not disregard it completely and render a judgment wholly unsupported by any authority whatsoever.

*Wherefore,* your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Tenth Circuit commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, the full proceedings in this case, numbered 3951, *Keokuk Steel Casting Company, a Corporation, appellant,* v. *J. R. Lawrence, appellee,* and that said judgment of the said Court of Appeals be reversed by this Honorable Court and such other and further relief as equity and justice demand.

Respectfully submitted,

J. O. Boyd, Keokuk, Iowa,
G. C. Spillers, Jr.,
Tulsa, Oklahoma,
G. C. Spillers, Tulsa, Okla.,

By .....,
G. C. Spillers,
*Counsel for Petitioner, Keokuk Steel Casting Company, a Corporation.*

**IN THE SUPREME COURT OF THE UNITED STATES.**
***October Term, 1949.***

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**No. .....**

---

**KEOKUK STEEL CASTING COMPANY, a Corporation,**
***Petitioner,***
***vs.***
**J. R. LAWRENCE, *Respondent.***

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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The opinion of the United States Court of Appeals for the Tenth Circuit has not been officially reported. It is, however, printed in full in the record (R. 105).

### Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, Title 28, Section 347(a), F. C. A., and Supreme Court Rule 38, par. (5) (b), in that the Court of Appeals for the Tenth Circuit has

> "Decided an important question of local law in a way probably in conflict with applicable local decisions."

Judgment was entered on December 29, 1949 (R. 111), and the Court of Appeals entered an order staying the mandate to March 1, 1950 (R. 111).

**Statement of the Case.**

On December 28, 1939, the petitioner and respondent entered into a contract by the terms of which respondent became the petitioner's manufacturer's agent in a certain geographical area. Among other things this contract provided:

> "This contract shall remain in force continuously except that should either Company or Agent desire to terminate this contract, they may do so by giving thirty (30) days' notice in writing." (R. 17)

The contention of respondent is that this clause of the contract was modified by an exchange of letters which passed between the parties in August, 1941, to the extent that it was suspended by agreement of the parties for the duration of the respondent's service in the armed services of the United States. It is the contention of petitioner that it had the right and did cancel the contract, effective July 4, 1942.

This case has been tried twice. On the first trial judgment was rendered in favor of the petitioner and the respondent appealed the case to the United States Court of Appeals for the Tenth Circuit, where it was reversed. *Lawrence* v. *Keokuk Steel Casting Company,* 162 F. (2d) 929. In remanding this cause for a new trial the Court of Appeals held that the letters of August, 1941, were ambiguous and that upon a new trial the trial court should permit the introduction of evidence as to the parol negotiations which preceded the writing of the ambiguous letters. We shall now set out the pertinent portions of these letters. On August 23, 1941, the respondent wrote the following letter to the petitioner:

> "Dear Sir: With the international situation as it has been and now is, etc., I have for some time antici-

pated being recalled to the Navy. This anticipation was well founded due to the fact that on yesterday I was advised that my orders will be mailed on August 25th directing me to report for active duty on September 2d.

"I of course have not lost sight of the fact that you told me you and Mr. Brown had discussed the possibilities of this thing happening about a year ago and that you would carry on with me and service this part of the territory. This was of course a generous offer on your part and was certainly appreciated by me, however, this would not have been entirely fair to you and with this in mind some time ago I made arrangements to continue my office and business as in the past. This situation is a temporary one of course and when I am returned to civilian life I will naturally have to have a place to light, therefore the following is the case.

"Mr. James F. Lawrence is going to be the active head of my office and business and of course, Mrs. Murray will continue as in the past and in addition, I have Mr. B. E. Gray who will be in the office contacting and servicing the accounts." (R. 22)

The petitioner on August 27, 1941, replied to the respondent's letter as follows:

"Dear Bob: I wish to acknowledge receipt of your letter of August 23rd as well as confirm my conversation with you Monday.

"Needless to say, we are sorry that you have to give up your present contact with our customers. However, we are sure that the set-up outlined in your letter will take care of the servicing of our customers satisfactorily. Please advise your office that they may call on me at any time if they need any special service in connection with any requests that they may have from our customers." (R. 23)

The Court of Appeals in *Lawrence* v. *Keokuk Steel Casting Co., supra,* held that these letters were ambiguous

as to whether or not the termination clause of the original contract had been suspended or modified. The Court said:

> "The clause 'that you would carry on with me and service this part of the territory' is ambiguous. The language which follows indicates that Lawrence construed it to mean that the arrangement would continue during his service in the Navy. • • •
>
> "We are of the opinion that the trial court erred in disposing of the issues with respect to the alleged modification of the agency contract on summary judgment, and that it should have received evidence with respect to the oral negotiations of the parties prior to August 27, 1941, and, in the light of such evidence, determined the true intent and meaning of the letters of August 23 and 27." (R. 194)

Upon the second trial of this cause the respondent introduced evidence of the oral negotiations which preceded the correspondence set out above, for the purpose of attempting to resolve the ambiguities contained in those letters. The respondent, J. R. Lawrence, testified that in June, 1940, he had the following conversation with Mr. Jansson, the vice-president of the petitioner company:

> "A. Well, Mr. Jansson asked me my—how I stood in the draft, whether it looked as though I might be drafted. I told him, no, sir, I was too old to register at that time. And I did not anticipate going into the Armed Services. He told me that was fine, he was glad to hear it. That Mr. Brown had told him to come to Tulsa and tell me that in event I should go into the Armed Services that they would carry on with me, pay me my commission, service the account just the same as if I were here, and that I would have a place to light when I came back from the Service." (R. 53)

The respondent also presented the testimony of his secretary, Helen Nester Murray, who overheard the above

conversation between respondent and Mr. Jansson. Mrs. Murray testified:

> "Q. (By Mr. Hudson:) Just tell the substance of what you heard, Mrs. Murray—— A. Well, of course everybody was thinking we were going to have war, and since Mr. Lawrence was a Naval Academy graduate we assumed he would have to go. And Mr. Jansson stated that in case he did have to go that they would carry on with us as if Bob was there—Mr. Lawrence were there, and pay us our commission and service the accounts, so that we would still go on representing them and Bob would have a business to come back to." (R. 69)

The respondent further testified that after he wrote the letter of August 23, 1941, to the petitioner that he had a telephone conversation with Mr. Jansson prior to the petitioner's letter of reply of August 27, 1941. The gist of this telephone conversation was as follows:

> "Q. (By Mr. Hudson:) Go ahead. A. That he had received my letter of the 23rd and congratulated me on going into the Navy and stated that the arrangement was satisfactory as outlined in my letter and that they would carry on with me and try to have a nice business going when I got back and wished me lots of success." (R. 59)

The undisputed record discloses that from June, 1940, when Mr. Jansson, representing the petitioner, had the conversation set out above with the respondent, until the petitioner received the respondent's letter of August 23, 1941, a period of slightly more than a year, the petitioner and respondent had no conversations whatsoever. During that period Mr. Lawrence was called to active duty in the Navy. Petitioner knew nothing about the matter until it received Lawrence's letter of August 23, 1941, which informed it that these things had already been done.

Mr. H. D. McChesney testified that he was secretary-treasurer of the petitioner company during 1941, and that the petitioner company at no time ever considered or discussed the possibility of suspending or abrogating the cancellation clause in the contract between the parties of December 28, 1939, at any time. (R. 74)

Mr. Charles G. Jansson, witness for petitioner, testified that the petitioner at no time authorized him to change the cancellation clause of the original contract (R. 77). Mr. Jansson further testified that in all of the conversations which he had with the respondent that at no time was the cancellation clause mentioned (R. 92), and this was not denied by respondent.

The trial court found that the conversation which took place between Lawrence and Jansson about June, 1940, "together with all surrounding circumstances, disclosed that it was the intention of the parties to enter into a written modified agreement which would continue in effect until Lawrence was discharged from the Navy" (R. 39), and entered judgment in favor of the respondent and against the petitioner for the sum of $10,267.70 (R. 41). The petitioner then appealed to the Court of Appeals for the Tenth Circuit, which affirmed the judgment of the trial court. In the opinion of the Court of Appeals, which has not yet been officially reported, the Court of Appeals held:

> "The provisions of the two letters, read in the light of the oral evidence, plainly indicated that it was the intention of the parties that the modified agency contract should continue in effect until Lawrence's discharge from the Navy." (R. 111)

It is the petitioner's contention that the Court of Appeals failed to apply the applicable Oklahoma law, in compliance with the decision of this Court in *Erie Railroad Co.*

v. *Tompkins,* 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, and that had the Oklahoma law been applied to the case at bar that the decision would have been in favor of the petitioner and against the respondent rather than the other way around.

**Error Relied Upon.**

The failure of the Court of Appeals for the Tenth Circuit to cite, distinguish or apply the applicable statutes of the State of Oklahoma, or the decisions of its Supreme Court, to the case at bar, in accordance with the decision of this Court in *Erie Railroad Co.* v. *Tompkins, supra.*

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## ARGUMENT.

**1. Under the Statutes of the State of Oklahoma and the decision of its Supreme Court, judgment should have been rendered in favor of the petitioner, Keokuk Steel Casting Company, and against the Respondent, J. R. Lawrence.**

It was incumbent upon respondent to prove by a preponderance of the evidence that the cancellation clause of the original contract was suspended during his naval service or lose the case.

Title 15, Sec. 165, Oklahoma Statutes 1941, provides:

> "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

The petitioner is the "promisor" within the meaning of Title 15, Sec. 165, *supra,* and all of the evidence introduced in this cause clearly discloses that it was never the understanding of the petitioner that the termination clause

in the original contract should be waived, abrogated or rescinded, or that Lawrence so understood.

Title 15, Sec. 170, Oklahoma Statutes 1941, provides:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

This statute has been construed by the Oklahoma Supreme Court in *Kondos* v. *Stauffer,* 180 Okl. 185, 69 P. (2d) 338, wherein it held in its syllabus as follows:

> "If the words used give rise to ambiguity, the contract should be construed less favorably to the party using the ambiguous terms in the contract."

There is still a further rule of construction which is applicable to the facts of this case which is concisely stated in *Continental Supply Co.* v. *Levy,* 121 Okl. 132, 247 Pac. 967, wherein the court held in its syllabus as follows:

> "One claiming that a contract modifies a prior contract must show that the latter contract is definite and certain as to the terms of modification, *and the modification extends only so far as the terms are definite, certain and intentional.*" (Emphasis ours)

In the *Levy* case the court quoted with approval the following language from Page on Contracts, Sec. 2458:

> "Acts which are ambiguous in their character, and which are consistent either with the continued existence of the original contract, or with a modification thereof, are not sufficient to establish a modification."

The *Levy* case was cited and followed with approval in the case of *Black* v. *Silver,* 135 Okl. 198, 274 Pac. 886, in which the following language was used:

> "Evidence of a rescission or modification of a written contract by a subsequent oral agreement must be clear, positive and convincing."

The Court of Appeals in its opinion on the first appeal of this cause held that the letters of August 23 and 27, 1941, were ambiguous. The letter of respondent of August 23, 1941, informed the petitioner that respondent had already been called into the Navy. It also discloses that the parties had had some conversation a year before in which the possibility of respondent going into the Navy had been discussed, but that no agreement had been reached between the parties. The respondent stated that he had already made arrangements to continue his office with his father in charge. In other words, after the June, 1940, conversation in which the respondent told the petitioner that he did not anticipate being drafted that was the last the petitioner knew anything about the matter until it received respondent's letter of August 23, 1941. To this letter the petitioner replied:

> "We are sure the set-up outlined in your letter will take care of the servicing of our customers satisfactorily." (R. 23)

With this ambiguous evidence how can it be said that the respondent met the test laid down by the Oklahoma Supreme Court by showing that the alleged modification of the termination clause of the original contract was in language which was definite, certain and intentional?

We submit that an ambiguity cannot be resolved by an ambiguity. Mr. Jansson's testimony that the cancellation

clause was never specifically mentioned in any conversation between petitioner and respondent was not denied by Mr. Lawrence. The position of the respondent is untenable. He asserts that the petitioner voluntarily waived or suspended the termination clause for the duration of respondent's Naval service. As it ultimately turned out, respondent was in the Navy for four and one-half years. The war might easily have lasted ten or even twenty years. Particularly would it be unreasonable for petitioner to have accepted the employment of the respondent's father for an indefinite period of time without the right to cancel his contract of employment, when petitioner did not know respondent's father and had never seen fit to employ even the respondent himself indefinitely without the power to terminate his employment on thirty days' notice.

We submit that the testimony of the respondent utterly failed to prove that the cancellation clause was suspended in terms which were definite, certain and intentional; that under the rules of construction prescribed by the law of Oklahoma judgment should have been rendered in favor of petitioner and against respondent, and that had the trial court and Court of Appeals applied the applicable Oklahoma law hereinabove referred to, judgment would have gone in favor of petitioner and against the respondent.

**2. The Court of Appeals for the Tenth Circuit failed to follow the applicable Oklahoma law as it was required to do by *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817.**

This Court held in the *Erie Railroad* case:

> "That except in matters governed by the Federal Constitution or Acts of Congress, the law to be applied in any case is the law of the state."

In commenting on this landmarked decision, in *Meredith* v. *City of Winter Haven,* 320 U. S. 228, 88 L. ed. 9, 64 S. Ct. 7, this Court noted that the *Erie Railroad* case, *supra:*

> "Did not free the Federal Courts from the duty of deciding questions of state law in diversity cases. Instead, it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which Federal law does not govern."

This Court, in *Klaxon Co.* v. *Stentor Elec. Mfg. Co.,* 313 U. S. 486, 85 L. ed. 1477, 61 S. Ct. 1020, noted that it was the function of the Federal courts "to ascertain what the state law is, not what it ought to be."

In the opinion of the Court of Appeals from which this appeal is taken it will be noted that after quoting in full the language of the ambiguous letters hereinabove referred to, the Court of Appeals did not quote the testimony of the oral negotiations between the parties which was declared to resolve the ambiguities contained in these letters, despite the fact that the summary of the conversations between Mr. Lawrence and Mr. Jansson of June, 1940, as set out in the opinion, was longer than the actual testimony itself. The Court of Appeals had cited to it by petitioner all of the Oklahoma statutes and decisions hereinabove cited, yet in its opinion it does not mention any of these decisions and statutes although they are directly in point, and in the application of which the petitioner had a valuable substantive right. The court likewise does not attempt to distinguish any of these decisions or statutes. The Court of Appeals does not cite any law whatsoever to sustain its decision affirming the judgment of the trial court. The Court of Appeals merely stated in support of its judgment:

"The provisions of the two letters, read in the light

of the oral evidence, plainly indicate that it was the intention of the parties that the modified agency contract should continue in effect until Lawrence's discharge from the Navy." (R. 111)

*From a reading of the Court of Appeals' opinion it is impossible to ascertain whether or not that court considered the Oklahoma law at all.* The fact that the court cites no Oklahoma law at all is a point which has been considered by this Court in another case. In *Griffin* v. *McCoach,* 313 U. S. 498, 85 L. ed. 1481, 61 S. Ct. 1023, this Court in discussing the rule laid down in the *Erie Railroad* case stated:

> "But this is something to be decided according to Texas decision, *to none of which the opinion refers.* * * * The decision must be reversed and remanded to the Circuit Court for determining the law of Texas as applied to the circumstances of this case." (Emphasis ours.)

In *Cities Service Oil Co.* v. *Dunlap,* 308 U. S. 208, 84 L. ed. 196, 60 S. Ct. 201, this Court held that a local rule of law dealing with burden of proof was not a mere rule of equity practice, but represented a substantial right which the Federal Court could not ignore simply because it felt that the majority rule was a better one and should be followed instead.

It is the petitioner's contention that the rules of construction of Oklahoma are likewise substantive rights which may not be denied to petitioner.

## *Conclusion.*

It is respectfully submitted that a proper application of the Oklahoma law hereinabove referred to should have resulted in a judgment in favor of petitioner and against respondent.

We submit that this case presents a matter of general interest for the following reason, to-wit: That if the Federal Courts may refuse or fail to apply the applicable local law in their opinions, as they are required to do by *Erie Railroad* case, by simply failing to cite, distinguish or otherwise consider the appropriate state law, then the rule of *Erie Railroad Co.* v. *Tompkins* is a dead letter. After the *Erie Railroad* case, this Court was confronted with appeals in which the inferior Federal Courts for one reason or another felt that the rule of the *Erie Railroad* case was inapplicable and they so stated into the record. There is no decision of this Court, however, touching directly on the point raised in this case which we have been able to discover; that is, the total failure of the Court of Appeals to cite any authority whatsoever for its decision, with the result that it is impossible from reading that court's opinion to determine whether or not the court did or did not apply the applicable state law. We realize, of course, that to require the Courts of Appeal to cite or distinguish every allegedly applicable state decision cited to it would present an undue burden on those courts, but on the other hand where state decisions are patently close in point, then better practice should require that such decisions be not overlooked or ignored entirely.

We therefore submit that this cause should be reversed and pray that this Court issue the writ prayed for.

Respectfully submitted,

J. O. Boyd,
Keokuk, Iowa,

G. C. Spillers,
G. C. Spillers, Jr.,
Tulsa, Oklahoma,
*Counsel for Petitioner.*